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CHARLES ELMORE CROP

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 15

IOWA-DES MOINES NATIONAL BANK, *Petitioner,*

vs.

J. M. STEWART, et al., *Respondents.*

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 711

IOWA-DES MOINES NATIONAL BANK, *Petitioner,*

vs.

J. M. STEWART, Chairman of the Board of Supervisors of Polk County, et al., *Respondents.*

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The respondents, J. M. Stewart as Chairman of the Board of Supervisors, et al., respectfully makes this resistance to the petition for writ of certiorari filed herein:

GENERAL STATEMENT AS TO MATTERS INVOLVED.

These respondents, while not admitting the entire correctness of either the transcript filed herein, or of the statement of facts as set out in the Petition for the writ of certiorari, or in petitioner's brief in support thereof, and expressly reserving the right to deny and correct same at the proper time, does show to this Honorable Court that upon the tran-

script and petition as filed this Honorable Court should not grant, and petitioner has no right to demand that a writ of certiorari issue herein for the following reasons:

REASONS WHY WRIT SHOULD NOT ISSUE.

I.

The petitioner if, as claimed, a federal question was involved, might have originally brought its suit in the Federal Court. Instead it voluntarily submitted itself to the jurisdiction of the State Court, and pursued its remedy to the highest court of the state, and then when the decision was against it in that court, and after all of the proceedings as set out on pages 1956 to 1959 of the transcript herein, it filed in said Supreme Court of Iowa its notice of intention to petition for a rehearing as provided by the laws of Iowa and rules of said court upon the decision of said court against it as originally rendered, thus again submitting itself to and invoking the jurisdiction of said court. That without waiting for the ruling of said Supreme Court upon said notice of petition for rehearing, this petitioner abandoned said petition, thus preventing any final decision on said cause, and placing the matter in such a position that neither the Supreme Court of Iowa, nor the Supreme Court of the United States, has any jurisdiction in the matter, except to carry out the decree as originally rendered by the District Court and affirmed by the Supreme Court of Iowa.

See statement and certificate of the Clerk of the Supreme Court of Iowa as set out in the appendix hereto.

Petitioner has therefore waived the right and is estopped to now sue out a writ of certiorari from this Honorable Court.

The following case supports this proposition:

Matthews vs. Howe, 269 U. S. 262.

The following are the statutes of the State of Iowa on this subject as found in the Code of 1927:

Code Sec. 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party, or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Code Sec. 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

Code Sec. 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

II.

The petitioner, after it had procured the stay order from the Supreme Court of Iowa, as set out on pages 1958 and 1959 of the transcript, on the ground that it desired to carry said cause to the United States Supreme Court, filed in said Supreme Court of Iowa, in the manner provided by law, its notice of intention to file a petition for rehearing in said cause, thus invoking the power of that court to change the opinion and decision theretofore rendered against petitioner and thereby abandoning petitioner's right, if any it had, to sue out a writ of error from this Honorable Court.

The following are the statutes of the State of Iowa on this subject as found in the Code of 1927:

Code Sec. 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Code Sec. 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

Code Sec. 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

III.

After the decision of the Supreme Court of Iowa complained of herein, was filed the petitioner herein procured from the Supreme Court of Iowa, an order staying the issuance of any procedendo to the District Court which entered the original decree as set out on Page 1959 of transcript. That the decree and judgment of the Iowa courts did not become final and enforceable, under the laws of that state until the procedendo is sent down by the Supreme Court to the lower court, and therefore there is not yet any final decree in the State Court such as would give this Honorable Court jurisdiction under Section 237 of the Judicial Code as amended. The following case supports this proposition:

Ohio River Co. vs. Fisher, (4th C. C. A.) 115 Fed. 929.

The rule of the Supreme Court of Iowa as to procedendo is as follows:

Rule 37. No procedendo shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled.

The provisions of the Code of Iowa of 1927 on this matter are as follows:

> Code Sec. 12875. If the supreme court affirms the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require.
>
> Code Sec. 12876. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court.

IV.

The record fails to show that there was any, intentional, systematic, general and habitual method of administering the statutes of Iowa, to the disadvantage of petitioner. The act of the auditor complained of was his individual act, without legal right or authority and contrary to the statutes of Iowa and it was so found by the Supreme Court of Iowa in its opinion as set out in the transcript beginning on Page 1900, this special point being found on page 1914.

The following cases support this proposition:

Davenport Natl. Bank vs. Board, 64 Iowa 140-3;
Jenkins vs. Neff, 46 U. S. L. Ed. 1140;
Barney vs. City of New York, 193 U. S. 430-8;
Ft. Madison Co. vs. Maxwell, 202 Iowa 1346.

V.

Petitioner is not claiming any title, right, privilege or immunity within the meaning of Judicial Code Section 237. There can be no right, privilege or immunity, to be taxed improperly and contrary to law and in a less amount than the law provides, because some one else is improperly and

contrary to law taxed in a less amount than he should be on account of the illegal and improper acts of a ministerial official, such as the county auditor in this case. Petitioner is not claiming that the provisions of the law as to its taxation have not been properly carried out, it admits that they have. What it is claiming is that because certain other persons, who it claims were in competition with it, were allowed by the illegal acts of the county auditor to be taxed at a less rate than the law required, then petitioner should also be allowed to escape a part of its taxes, contrary to law. Thus adding to the wrong already committed against the taxpayers who have been legally taxed and who must make up and pay the taxes escaped by the petitioner and other persons illegally taxed in too small an amount. Certainly no privilege or immunity, under the Constitution of the United States could arise under this state of facts. The Constitution is a shield, and is not for the purpose of perpetuating and increasing a wrong already committed, or to put people on an equal basis by allowing them all to commit the same wrongs. The following case supports this proposition:

State vs. Hall, 54 Southern, 560.

VI.

The petitioner is not entitled to certiorari where the decision of the state court rests even in part on a question of state practice, or on the question of having pursued the wrong remedy. The Supreme Court of Iowa in this case partly at least rested its decision on the ground that petitioner's remedy was by appeal to the board of review, and thence to the District Court, and not by mandamus, therefore petitioner has no right to have that question reviewed by this Honorable Court.

The following cases support this proposition:

Eustis vs. Bolles, 150 U. S. 361-70;
Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556;
Griswold Land & Credit Co. vs. Calhoun Co., 198 Iowa, 1240.

The respondents therefore respectfully submit there is no occasion for a writ of certiorari, the petitioner has had its day in court and has had due process of law. The decision of the Iowa Supreme Court should remain the law of the case.

Respectfully submitted,

MAXWELL A. O'BRIEN,
ESKIL C. CARLSON,
Attorneys for Respondents,
With whom are
CHAS. HUTCHINSON AND
GEORGE A. WILSON,
Of Counsel.

APPENDIX.

CERTIFICATE OF CLERK OF SUPREME COURT OF IOWA.

IN THE SUPREME COURT OF IOWA.

Iowa-Des Moines National Bank, Appellant,
vs. In Equity.
J. M. Stewart, et al., Appellees.

CERTIFICATE OF RECORD.

To the Supreme Court of the United States:

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, hereby certify that in the above entitled cause, an appellees' Notice of Intention to Petition for Rehearing was filed in my office on the 25th day of October, 1930, which said appellees' Notice, together with the acceptances of service thereon, reads in words and figures, as follows, to wit:

"To the Appellant, Iowa National Bank, and to Gamble, Read and Howland, its attorneys, and to B. W. Garrett, Clerk of the Supreme Court of the State of Iowa:

You are hereby notified that the appellees in the above entitled cause intend to file a petition for rehearing in the above entitled cause within sixty (60) days after the filing of the opinion of the Supreme Court of Iowa therein.

MAX O'BRIEN,
GEO. A. WILSON,
ESKIL CARLSON,
CHAS. HUTCHINSON,
CARL MISSILDINE,
Attorneys for Appellees.

Service of the above and foregoing Notice of Intention to petition for rehearing is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 25th day of October, 1930.

GAMBLE, READ & HOWLAND,
Attorneys for Appellant.

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and the same filed in my office this 25th day of October, 1930.

B. W. GARRETT,
Clerk of the Supreme Court of Iowa."

And on the 27th day of October, 1930, in the said matter, there was filed in my office an Appellant's Notice of Intention to Petition for Rehearing, a copy of which Appellant's Notice, together with the acceptances of service thereon, reads in words and figures, as follows, to wit:

"To the Appellees, J. M. Stewart, Chairman of the Board of Supervisors of Polk County, Iowa, C. W. Keller, Frank Thornton, C. F. Keeling and E. R. Bennett, members of and constituting the Board of Supervisors of Polk County, Iowa, State of Iowa, and to George A. Wilson, John Fletcher, Attorney General, Maxwell A. O'Brien, Assistant Attorney General, Eskil Carlson, Charles Hutchinson, Carl Missildine, Attorneys for Appellees; to J. G. Cook, County Auditor of Polk County, or to Eskil C. Carlson, his attorney; to Allen Munn, County Treasurer of Polk County, or to Charles Hutchinson, his attorney; and to B. W. Garrett, Clerk of the Supreme Court of the State of Iowa:

Please take notice that the appellant in the above entitled cause, Iowa National Bank, Iowa-Des Moines National Bank, will petition for a rehearing and will, within sixty days after the filing of the opinion of the Supreme Court of Iowa, dated September 26th, 1930, file in the office of the Clerk of said Court, its petition for rehearing. Said petition for rehearing will pray that the opinion filed in the office of the Clerk on September 26, 1930, be set aside and that a rehearing be granted.

GAMBLE, READ & HOWLAND,
Attorneys for Appellant.

Service of the above and foregoing Notice of Intention to Petition for rehearing is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 27th day of October, 1930.

C. S. MISSILDINE, Co. Atty.,
by C. A. B. Asst.,
CHAS. HUTCHINSON,
GEO. A. WILSON,
ESKIL C. CARLSON,
JOHN FLETCHER,
MAXWELL A. O'BRIEN,
Attorneys for Appellees.

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and the same filed in my office this 27th day of October, 1930.

B. W. GARRETT,
Clerk of the Supreme Court of Iowa."

I hereby further certify that the foregoing copies are full, true, correct and complete copies of the appellees' Notice of Intention to Petition for Rehearing and appellant's Notice of Intention to Petition for Rehearing, filed in the said matter; and there is no further record whatsoever in this Court relative to or on either of the said appellees' Notice of Intention to Petition for Rehearing or appellant's Notice of Intention to Petition for Rehearing, and no petitions for rehearing were filed.

WITNESS my official signature and the Seal of the Supreme Court of the State of Iowa, at Des Moines, Polk County, Iowa, this 4th day of March, A. D. 1931.

SEAL

B. W. GARRETT,
Clerk of the Supreme Court.